Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 19, 1995

Ms. Myra C. Schexnayder
Assistant School Attorney
Houston Independent School District
Hattie Mae White Administration Building
3830 Richmond Avenue
Houston, Texas 77027-5838

OR95-008

Dear Ms. Schexnayder:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28906.

The Houston Independent School District (the "school district") received a request for, among other things, "all reports detailing completed investigations by the [school district's] professional standards department since January 1, 1993."[1] You claim the requested information is excepted from required public disclosure under sections 552.101, 552.102, 552.103, 552.111, and 552.114 of the Government Code, the Texas Open Records Act (the "act"). We first address the school district's arguments under sections 552.103 and 552.111, which we believe have been frivolously raised in blatant disregard of the requirements of prompt disclosure of public information under the act.[2]

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[1]We note that the requestor seeks information set out in four categories. The school district has informed us that it has released documents responsive to the requestor's first category of requested information and is prepared to release documents responsive to the requestor's third category. We assume that the school district has in fact by this time released the documents responsive to the third category of requested information. You do not raise any exceptions in response to the fourth category. We assume this information has been made available to the requestor. This ruling concerns only those documents responsive to the requestor's second category.

[2]We note that Sections 552.103 and 552.111 are discretionary exceptions under the act; thus, the school district could have released information subject to these provisions, which was not otherwise confidential by law, without first asking this office for a ruling. *See* Gov't Code § 552.007.

Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a 1993 opinion that reexamined the section 552.111 exception, this office concluded that section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5 (copy enclosed). The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not and has never excepted severable, factual information from disclosure. *Id; see also Austin v. City of San Antonio* 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (concluding that statutory predecessor to Gov't Code § 552.111 does not except from disclosure "objective data"); Open Records Decision Nos. 582, 574, 565, 563 (1990); 466, 462 (1987); 424, 420, 419 (1984); 231, 230, 225 (1979); 213, 211, 209, 192 (1978); 179, 178, 164,163 (1977); 149, 128 (1976). Likewise, federal court decisions interpreting exemption 5 in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5), on which section 552.111 was patterned, have held that the federal exemption does not apply to severable factual information. *See, e.g., Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-9 (1973); *Ethyl Corp. v. Environmental Protection Agency*, 478 F.2d 47, 49-50 (4th Cir. 1973); *General Services Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960); *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972)

All of the documents submitted for our review concern internal personnel matters. Furthermore, the documents are essentially a compilation of facts surrounding an incident and a conclusion by the investigation team of whether the allegations can be sustained based on the available evidence. There is little if any indication of advice, recommendation, or opinion as to the course of action or policy the district should follow in response to the investigation. Moreover, what little information that may be considered advice, opinion, or recommendation does not relate to the deliberative or policymaking processes of the school district.

You suggest that this office should reconsider the interpretation of section 552.111 in Open Records Decision No. 615 (1993) in light of a July 25, 1994, ruling in *Klein Independent School District v. Lett*, No. 93-061897 (80th Dist. Ct., Harris County, Tex., July 25, 1994). This office was not a party to that action. Furthermore, appellate courts in Texas do not rely upon unpublished opinions as authority. *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 216 (Tex. App.--Houston [1st Dist.] 1986, no writ) ("An unpublished opinion of this Court or any other court has no authoritative value."); *see also* Tex. R. App. P. 90(i) ("Unpublished opinions shall not be cited as authority by counsel or by a court."); *Orix Credit Alliance v. Omnibank*, 858 S.W.2d 586, 593 n.4 (Tex. App.--Houston [14th Dist.] 1993, writ dism'd w.o.j.); *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498, 501 (Tex. App.--Austin 1991, writ denied). For this reason, the Office of the Attorney General generally does not consider unpublished rulings in making determinations under the Open Records Act. This office continues to adhere to Open Records Decision No. 615.

We believe that the school district has failed to comply with the act by raising section 552.111 for documents that are clearly not protected from disclosure under the exception. First, this office has concluded in several open records rulings to the school district that, under the conclusion in Open Records Decision No. 615, the school district may not withhold records regarding personnel matters. *See* Open Records Letter Nos. 94-389, 94-394, 94-582 (1994). Secondly, even if this office were to accept your argument that section 552.111 applied to personnel matters, much, if not all, of the information contained in the documents submitted for our review is purely factual in nature, which is clearly not protected from disclosure under any decisions from this office, either prior to or subsequent to Open Records Decision No. 615. *See* Open Records Decision No. 230 (1979) (concluding that a school district's investigative report regarding its employees is not protected by former section 3(a)(11) because it is "wholly factual and does not contain the type of opinion, advice, or recommendation on policy matters"). The investigative reports recount factual occurrences except for the investigative team's ultimate conclusion confirming or not confirming the allegations. It is clear that the school district may not withhold the requested information under section 552.111 of the Government Code and had no basis on which to raise this argument in its request for a ruling from this office.

We next address your arguments under section 552.103(a), which excepts from disclosure information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
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> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

The school district contends that "[g]iven the nature of the allegations underlying the investigations (e.g., physical assault, possession of weapons, child abuse, sexual assault), it is conceivable that [school district] employees may ultimately be named as parties to litigation of a criminal or civil nature." Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. *See* Open Records Decision Nos. 518 (1989); 328 (1982). It is well settled that the mere chance of litigation is clearly not sufficient to trigger section 552.103. Open Records Decision Nos. 555 (1990); 518 (1989); 429 (1985); 437 (1986); 417, 416, 410 (1984); 397, 361, 359

(1983); 351, 326, 323, 311 (1982); 289, 288 (1981); 219, 183 (1978); 139 (1976). The school district's claim that future litigation is "conceivable" due to the nature of the investigations is far too nebulous and generalized an argument to satisfy the school district's burden to show how documents relate to reasonably anticipated litigation. Clearly, the school district may not withhold the information under section 552.103.[3] We believe that the school district has raised section 552.103 in a frivolous manner with no basis in law or fact to claim the exception.

We next turn to your arguments for withholding the documents under sections 552.114, 552.101, and 552.102. We note at the outset that the school district failed to mark the documents to enable this office to determine what information the school district claimed was protected from disclosure under these sections. *See* Open Records Decision No. 419 (1984) (concluding that general claim that exception applies to entire report, when exception is clearly not applicable to all information in report, does not comport with act's procedural requirements). Ironically, the school district failed to raise confidentiality provisions outside the act that apply to some of the records submitted for our review.

You argue that section 552.114 excepts some of the documents from required public disclosure. Under section 552.114(a), information is excepted "if it is information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 incorporates the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), into the Open Records Act. Section 552.026 specifically provides that the act

> does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026; *see also* Open Records Decision No. 431 (1985). FERPA provides the following:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1). "Education records" are records which:

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[3]Although such information may not be withheld under section 552.103, *see infra* pp. 4-6 for a discussion of information that may be protected by confidentiality provisions or common-law privacy.

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). However, sections 552.114(a) and 552.026 may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." Open Records Decision No. 332 (1982) at 3. Thus, the school district must withhold only information identifying or tending to identify students or their parents.

We again note that the school district failed to deidentify or segregate the documents that contain information subject to FERPA. After an exhaustive review of all of the records submitted for our consideration, we conclude that some of the documents contain information relating to students. We have marked the type of information that must be withheld under FERPA.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The following types of documents are confidential by statute: medical records or communications between a physician and patient under the Medical Practice Act, V.T.C.S. art. 4495b, § 5.08 (b), (c), which may be disclosed only as permitted under section 5.08(b);[4] communications between a patient and a mental health professional or records concerning the identity, diagnosis, evaluation, or treatment of a patient under Health and Safety Code section 611.002(a); records of the identity, evaluation, or treatment of a patient by emergency medical services personnel that are created by the emergency medical services personnel or maintained by an emergency medical services provider under Health and Safety Code section 773.091(b); and law enforcement records concerning juvenile offenders under Family Code section 51.14(d) and article 15.27(f) of the Code of Criminal Procedure.[5] We have marked the

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[4]Medical records created by an individual "under the supervision" of a physician are also confidential under article 4495b. Open Records Decision No. 324 (1982) at 2.

[5]We note that section 552.117 excepts from disclosure the home addresses and telephone numbers of all peace officers, as defined by article 2.12 of the Code of Criminal Procedure, or security officers commissioned under section 51.212 of the Education Code, and the home addresses and telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold any home address or telephone number of a peace officer or security officer as defined above that appears in the requested documents. In addition, section 552.117 requires you to withhold any home address or telephone number of an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994); 455 (1987). You may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was

type of information that must be withheld as confidential information under these statutes.[6]

Section 552.101 also excepts information that is confidential under constitutional or common-law privacy. Constitutional privacy consists of two interrelated types of privacy: 1) the right to make certain kinds of decisions independently and 2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

In order for information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

> information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

(Footnote continued)

made. Whether a particular piece of information is public under section 552.117 must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

[6]In addition, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We caution, however, that an employer may be required to obtain an employee's social security number under laws that predate October 1, 1990; a social security number obtained under a law that predates October 1, 1990, is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers contained in the submitted documents are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990. We note, however, that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts:

> (a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.
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> (b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under statutory predecessor to Gov't Code § 552.102 was same as that delineated in *Industrial Found.* for statutory predecessor to Gov't Code § 552.101). Accordingly, we will consider whether any of the information contained in the submitted documents is excepted from required public disclosure under section 552.101 and section 552.102 together.

The scope of public employee privacy is very narrow. *See* Attorney General Opinion JM-229 (1984); Open Records Decision Nos. 421, 423 (1984); 400 (1983); 336 (1982). Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. *See* Open Records Decision Nos. 444 (1986); 400, 405 (1983). Similarly, information regarding a public employee's dismissal, demotion, promotion, or resignation is not excepted from public disclosure. *Id.; see also* Open Records Decision No. 230 (1979) (concluding that the predecessor to section 552.102 did not except from public disclosure an investigative report regarding allegations of misuse of school district employees and materials).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress);

455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992); 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986); 393 (1983); 339 (1982); *see also infra* discussion of sexual harassment investigations. We have reviewed the documents submitted for our consideration and have marked the information that must be withheld under constitutional or common-law privacy.

Some of the documents submitted for our review concern the investigations of alleged sexual harassment. In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest in this matter was sufficiently served by the disclosure of these documents. *Id.* at 525. The court held that the nature of the remaining information, *i.e.*, the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*[7] We have marked the information that must be withheld from the investigations concerning sexual harassment allegations in accordance with the decision in *Ellen*.

In summary, we have marked the information protected by common-law privacy, FERPA, and various confidentiality statutes. We note, however, that some of the investigative reports did not contain confidential information protected either by common-law privacy or any confidentiality statute. The school district should be aware by now that sections 552.101 and 552.102 do not protect information concerning the manner in which a public employee performs his or her job. In addition, we believe that the school district raised sections 552.103 and 552.111 in a frivolous manner, in complete disregard of prior open records decisions concerning both of these exceptions. By raising

[7]Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of the information outweighs the accused's privacy interest. *See Ellen*, 840 S.W.2d at 525.

such frivolous arguments to withhold this information and thereby delaying the prompt release of clearly public information, the school district has failed to comply with section 552.221 of the act. We caution that, in future requests to the attorney general, the school district must make every attempt to release clearly public information and refrain from raising frivolous arguments in order to avoid the act's requirements regarding the prompt release of clearly public information. If the school district continues to act in this manner, the attorney general will take whatever legal steps necessary to require the school district to conform to the provisions of the Texas Open Records Act.

If you have questions about this ruling, please contact our office.

Yours very truly,

Dan Morales

Dan Morales
Attorney General of Texas

DM/LRD/LBC/rho

Ref.: ID# 28906

Enclosures: Marked documents

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